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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 329 83.

JOHN JOYCE, PLAINTIFF IN ERROR,

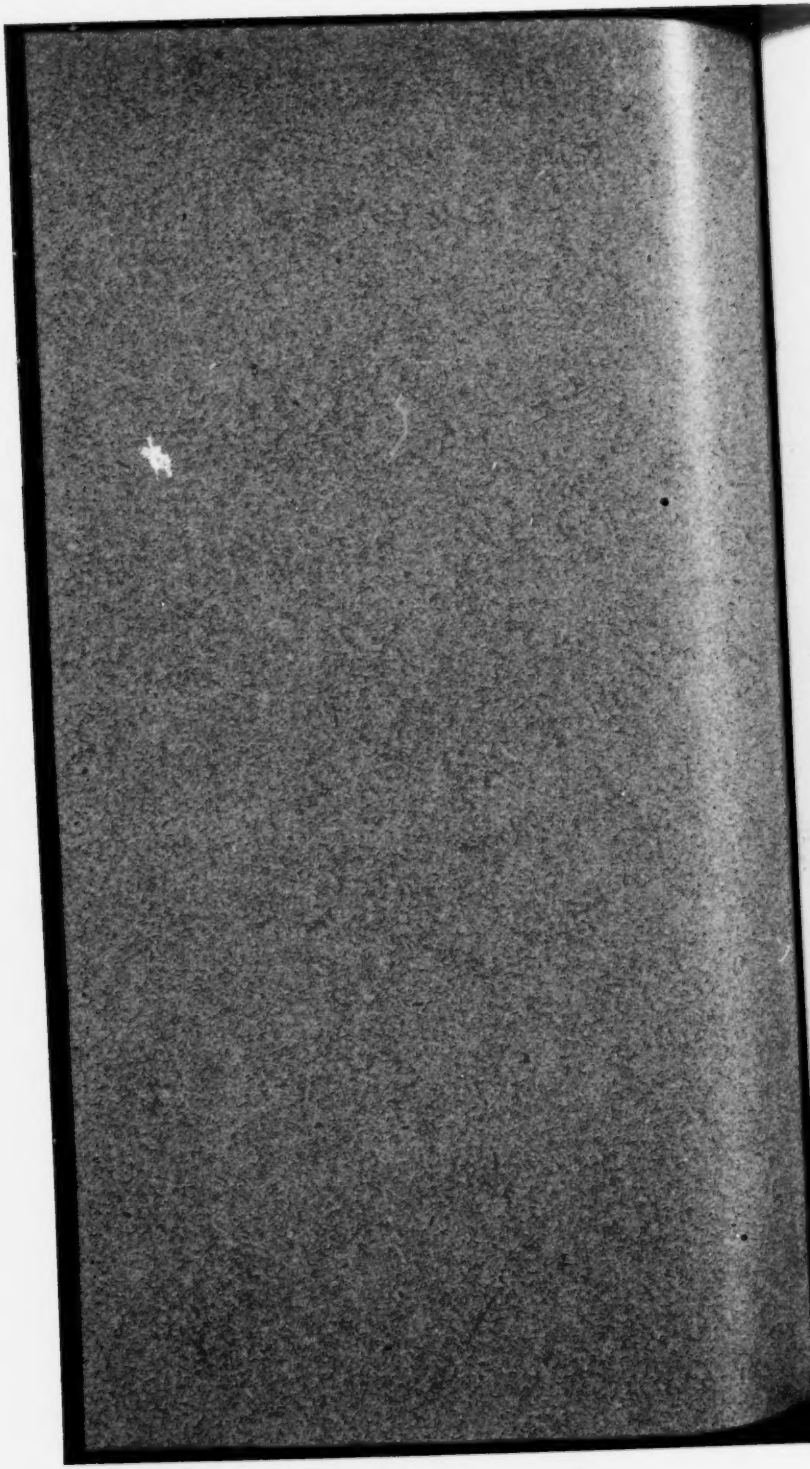
vs.

H. F. AUTEN, SUCCESSOR OF STERLING R. COCKRILL, AS RECEIVER OF THE FIRST NATIONAL BANK OF LITTLE ROCK, ARKANSAS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JUNE 22, 1899.

(17,443.)



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INDEX.

	Original.	Print.
Transcript from the circuit court of the United States for the southern district of Ohio	1	1
Petition	1	1
Waiver of summons and entry of appearance	3	3
Stipulation to correct record	3	3
Demurrer to petition	4	4
Stipulation to withdraw demurrer, &c	4	4
Stipulation as to time to answer	4	4
Order granting time to file answer	5	5
Answer	5	5
Demurrer to answer	9	9
Order sustaining demurrer to answer, &c	10	9
Order granting leave to file amended answer	10	10
Amended answer	10	10

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	Original.	Print
Demurrer to amended answer	15	14
Judgment	15	14
Petition for writ of error	16	15
Assignment of errors	17	16
Order allowing writ of error	17	16
Bond on writ of error	18	17
Clerk's certificate	19	18
Writ of error	19	18
Citation and service	20	19
Appearance for plaintiff in error	23	20
Consent to filing brief of defendant in error	23	21
Order beginning argument	24	21
Order concluding argument and submitting cause	24	21
Judgment	25	22
Opinion	26	22
Clerk's certificate	35	29
Petition for writ of error	36	30
Allowance of writ of error	38	31
Assignment of errors	40	31
Writ of error	43	32
Citation	44	33
Proof of service of citation	45	33
Bond on writ of error	46	33
Clerk's certificate	48	34
Stipulation to substitute H. F. Auten, receiver, as defendant in error	49	35

1 *Transcript of Record.*

At a stated term of the circuit court of the United States, within and for the sixth judicial circuit and eastern division of the southern district of Ohio, begun and held at the court-rooms in the city of Columbus, on the first Tuesday of December, being the seventh day of that month, in the year of our Lord one thousand eight hundred and ninety-seven, and in the one hundred and twenty-second year of the Independence of the United States of America—present, the Hon. William H. Taft, circuit judge—among the proceedings had were the following, to wit:

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant.

Be it remembered that heretofore, to wit, on the 1st day of May, in the year of our Lord one thousand eight hundred and ninety-seven, came the plaintiff, by his attorney, and filed in the clerk's office of the court aforesaid his certain petition in this cause against the said defendant, which said petition is clothed in the words and figures following, to wit:

Petition.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant.
} Petition.

Plaintiff says that the First National Bank of Little Rock, Arkansas, is a corporation organized under the banking laws enacted by the Congress of the United States; that on the first day of
2 February, 1893, the said bank became insolvent and suspended business; that on the 6th day of February, 1893, a receiver was duly appointed by the Comptroller of the Currency of the United States to take charge of all the assets of the said bank, and administer the trust according to law; that during the month of August, 1893, said receiver, so appointed as aforesaid, resigned, and your said plaintiff was duly appointed receiver of the said bank, and for the purposes aforesaid, by the Comptroller of the Currency of the United States; that said plaintiff immediately entered upon the discharge of his duties as such receiver, and since said time has been, and still is, such receiver; that your said plaintiff is a citizen of the State of Arkansas, and that the defendant, John Joyce, is a citizen of the State of Ohio, and a resident and inhabitant of the district aforesaid. Plaintiff further says that the

said defendant, John Joyce, is indebted to plaintiff on a promissory note, of which the following is a copy, with all credits and endorsements thereon:

"Three years after date, we, or either of us, promise to pay to the order of C. H. Whittemore, a receiver of the McCarthy & Joyce Company, the sum of nine thousand ($9,000.00) dollars, with interest at six per cent. per annum from date till paid. This is one of the three notes executed for purchase-money of the assets of the McCarthy-Joyce Company, this day sold to James E. Joyce & Company.

JAMES E. JOYCE & CO.
JOHN JOYCE.

Little Rock, Arkansas, March 20th, 1893."

Endorsements: "March 21, 1894. Rec'd $540, interest to date. D. W. McClure, att'y for receiver 1st Nat. Bk. of Little Rock." "Paid July 1st, 1895, p't of int. to date, $205.50." "James E. Joyce & Co." "C. H. Whittemore, rec'r."

Plaintiff further says that the amount in controversy, exclusive of costs, exceeds the sum of two thousand dollars. There is due plaintiff from the defendant on said promissory note the sum of $9,484.50, with interest thereon from the first day of July, 1895, at the rate of six per cent. per annum. Wherefore plaintiff prays judgment against the said defendant for the sum of $9,484.50, with interest thereon from the 1st day of July, 1895, at the rate of six per cent. per annum.

OUTHWAITE & LINN,
Attorneys for Plaintiff.

STATE OF OHIO, }
Franklin County, } *ss:*

Jos. H. Outhwaite, being first duly sworn, says that he is one of the attorneys in the above-entitled action; that said plaintiff is absent from said county wherein said affiant resides; that the facts stated and allegations set forth in the foregoing complaint are true as he verily believes.

JOS. H. OUTHWAITE.

Sworn to before me and subscribed in my presence by the
3 said Jos. H. Outhwaite, this 1st day of May, 1897.

A. L. THURMAN,
Notary Public, Franklin County, Ohio. [SEAL.]

And afterwards, to wit, on the 1st day of May, A. D. 1897, came the defendant, by his attorney, and filed in the clerk's office of said court his certain entry of appearance and waiver of process in this cause; which said entry and waiver is clothed in the words and figures following, to wit:

Entry of Appearance and Waiver of Summons.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff, *vs.* JOHN JOYCE, Defendant.	Waiver of Summons and Entry of Appearance.

Said defendant, John Joyce, hereby waives the issuing and service of process in the above entitled action and voluntarily enters his appearance in this court as defendant in said action.

JOHN JOYCE,
By POWELL & MINAHAN,
His Attorneys.

And afterwards, to wit, on the 25th day of May, A. D. 1897, came the parties, by their attorneys, and filed in the clerk's office of said court their certain stipulation in this cause; which said stipulation is clothed in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant.

It is hereby stipulated and agreed that the clerk of the United States court be, and he is hereby, authorized to erase the word "complaint" and substitute that of "petition" in the pleading entitled "complaint" and filed in the said cause.

OUTHWAITE & LINN,
Attorney- for Plaintiff.
POWELL & MINAHAN,
Attorney- for Defendant.

4 And afterwards, to wit, on the 1st day of June, A. D. 1897, came the defendant, by his attorneys, and filed in the clerk's office of said court his certain demurrer to the petition in this cause; which said demurrer is clothed in the words and figures following, to wit:

Demurrer to Petition.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant. } Demurrer.

Comes now the defendant and demurs to the petition of the plaintiff herein filed for the reason that the same does not state facts sufficient to constitute a cause of action against this defendant.

POWELL & MINAHAN,
Attorneys for the Defendant.

And afterwards, to wit, on the 1st day of June, A. D. 1897, came the parties, by their attorneys, and filed in the clerk's office of said court their certain stipulation in this cause; which said stipulation is clothed in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STIRLING R. COCKRILL, Rec'v'r of 1st Nat'n'l B'nk of Arkansas, Pl'ff,
vs.
JOHN JOYCE, Defendant. } Stipulation.

It is hereby stipulated and agreed by & between the parties to the above-entitled action that the defendant is to have until the 15th day of June, 1897, within which to file an answer in the above entitled cause, and that the demurrer hereinbefore filed be withdrawn by def't.

OUTHWAITE & LINN,
Att'ys for Pl'ff.
POWELL & MINAHAN,
Att'ys for Def't.

And afterwards, to wit, on the 14th day of June, A. D. 1897, came the parties, by their attorneys, and filed in the clerk's office of said court their certain stipulation in this cause; which said stipulation is clothed in the words and figures following, to wit:

Stipulation.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

5 STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant. } Stipulation.

It is this day stipulated by and between the parties to the above-entitled cause that the defendant have ten days from the date hereof within which to file *their* answer to the plaintiff's petition.

Approved:

OUTHWAITE & LINN,
For Plaintiff.
POWELL & MINAHAN,
Att'ys for Defendant.

And afterwards, to wit, on the 23rd day of June, A. D. 1897, an entry was made upon the journal of said court, in said cause, which said entry is clothed in the words and figures following, to wit:

Entry (*C*, 269).

STERLING R. COCKRILL, as Receiver, &c.,
vs.
JOHN JOYCE. } 810. Entry.

Upon application of defendant herein leave is granted said defendant to file his answer in this cause in fifteen days from this date.

And afterwards, to wit, on the 7th day of July, A. D. 1897, came the defendant, by his attorneys, and filed in the clerk's office of said court his certain answer in this cause, which said answer is clothed in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant. } Answer of John Joyce.

First defense. And now comes the said John Joyce, defendant, and for his first defense to the plaintiff's petition says that he admits the First National Bank of Little Rock, Arkansas, is a corporation

organized under the banking laws of the United States; that said bank became insolvent and suspended business in February, 1893; and that in the month of August, 1893, the plaintiff, Sterling R. Cockrill, was appointed receiver of said bank by the Comptroller of the Currency of the United States, and has ever since been and is still acting as such receiver. The defendant further says that he signed the note described in the petition as a surety only for the said firm of James E. Joyce and Company, who were the
6 principal makers thereof, and for the accommodation of said James E. Joyce and Company, without any value or consideration whatever between the parties and upon the express agreement and understanding that the conditions under which said note was to be executed, as hereinafter set forth, should be fully and faithfully complied with and performed. The defendant further says that the McCarthy & Joyce Company, a trading corporation of Little Rock, Arkansas, became involved, and, being unable to pay its debts, on or about the 16th day of January, A. D. 1893, made an assignment of all its real and personal property to C. H. Whittemore, as assignee, under the assignment laws of the State of Arkansas; and, after the said assignment, the said The First National Bank, being a preferred creditor to a very large amount, accepted said assignment according to its terms, and thereupon applied to the Pulaski chancery court to have said assignee, C. H. Whittemore, appointed its receiver of all and singular the property so assigned to him, and the said court, upon said application, duly appointed said Whittemore receiver of the said property, who immediately took possession of the same and proceeded to control and administer upon the same; and thereafter, by agreement of the First national bank and all other parties interested therein, the said receiver was directed by said court to sell all of said real and personal property, which he proceeded to do; which said sale was made on the 20th of April, 1893, to James E. Joyce and Company, who became the purchasers of all of said real and personal property at and for the price of thirty-eight thousand two hundred ($38,200.00) dollars, all of which has been paid by said James E. Joyce and Company, except the note described in the plaintiff's petition, and another note of like date and amount, which was signed by Bishop Edward Fitzgerald, as surety for the said James E. Joyce and Company, which said two notes represent the unpaid purchase-money arising from said sale.

Defendant further says that at the time the order for the sale of said real and personal property was made it was expressly provided and ordered by the court that the said receiver was, in addition to obtaining endorsers or sureties upon the notes given for the deferred payments, to retain and reserve a lien, under the statutes of the State of Arkansas, upon all the real and personal property so ordered to be sold, and this defendant, knowing that said property was more than sufficient in value to pay all the deferred payments as provided for in said sale, and relying upon the faithful
7 execution of said order by said receiver, became surety upon said note described in the petition herein. Defendant further

says that said receiver, after having received said note, in violation of the order of the court, and in violation of the rights of this defendant, negligently and wrongfully failed to retain or reserve a lien upon said property, real and personal, and improperly conveyed all of said real and personal property to the said James E. Joyce and Company, free and clear of any lien whatsoever. The defendant further says that said James E. Joyce and Company, after so receiving said property, have sold and conveyed all the personal property and nearly all the real estate to third persons, who were ignorant of said order of court, made for said sale; whereby the lien which ought to have been retained and reserved has been lost and the said defendant further says that said property was sufficient in value to have fully paid said note, as well as the other note given for the deferred payments, and the said First National Bank of Little Rock, Arkansas, as well as its receiver, having received the said note with notice of the foregoing facts, this defendant is discharged and released from the said note, he asks that the plaintiff be compelled to surrender said note and that the same be canceled by order of this court.

Second defense. The defendant, for a second defense herein says that when the McCarthy-Joyce Company made an assignment of all their real and personal estate to the said C. H. Whittemore, as assignee as set forth in the first defense herein, among the property so assigned were the following sixteen promissory notes, then the property of said company, and then in the possession of the First national bank for collection: Note of Zeb Ward, Jr., dated Nov. 23, 1892, ninety days, for $430.96—E. P. Ladd, date Nov. 1, 1892, ninety days, 328.30—C. Watkins, date Sept. 12, 1892, 5 months, 491.60—Faist & Co., date Dec. 7, 1893, 60 days, 265.00—Zeb Ward, Jr., date Dec. 31, 1892, 30 days, 465.00—J. C. England, date Dec. 31, 1892, 30 days, 3,954.00—W. L. Reaves, date Dec. 26, 1892, sixty days, 164.75—Zeb Ward, Jr., date Jan'y 9, 1893, 30 days, 346.06—F. Walker for the sum of 67.00—C. E. Moore, date Sept. 14, 1892, six months, 800.00—Spring Hill Lumber Co., Sept. 1, 1892, 6 mos., 550.00—Spring Hill Lumber Co., Sept. 1, 1892, 12 mos., 550.00—Malvern Lumber Co., Sept. 4, 1892, 1 year, 1,000 00—Malvern Lumber Co., Sept. 4, 1892, 2 years, 1,000.00—C. Watkins, August 18, 1892, 6 mos., 400.00—C. Watkins, August 16th, 1892, 12 mos., 475.00.

The defendant further says that on the 30 day of January,
8 A. D. 1893, an inventory of all the property so assigned was filed in the Pulaski chancery court by said assignee in which all of said notes were described as the property of said The McCarthy and Joyce Company, and therein stated to be in the possession of the said First National Bank of Little Rock for collection. And immediately after said assignment the said First national bank, being a preferred creditor therein to a large amount, accepted said assignment according to its terms and duly applied to the said Pulaski chancery court to have said assignee, C. H. Whittemore, appointed its receiver of all and singular the property so above assigned to him, including the notes hereinbefore described and this court, upon said application, duly appointed said Whittemore

its receiver of said property and he immediately thereafter took possession of the same and proceeded to control and administer it as such receiver and thereafter, by an agreement of the parties interested in said matter and by order of said court, the said receiver was directed to sell all of said property, including the notes herein described, which he proceeded to do, and the same were duly sold to James E. Joyce and Company, who agreed to pay for the same according to the terms of the sale, the sum of $38,200; which sale was made on the 20th of April, 1893, and approved by the said court; thereupon said court directed its said receiver to deliver to the said purchasers the stock of goods, and the choses in action, including the notes hereinbefore described, so assigned by said The McCarthy and Joyce Company, which said receiver undertook so to do. The defendant further says before said purchase the said First national bank became insolvent and Logan H. Roots was duly appointed receiver thereof by the Comptroller of the Currency of the United States, and demand was made upon him for such notes by the said James E. Joyce and Company and for the proceeds of such as had been collected, but said Roots declined to surrender said notes, and thereafter said Roots departed this life and one Armstrong was duly appointed receiver of said bank, from whom said notes and the proceeds of such as had been collected, were again duly demanded of him by the said James E. Joyce and Company, but he declined to surrender the same. That afterwards, said Armstrong resigned his said receivership and the plaintiff, Sterling R. Cockrill, was duly appointed receiver of said bank, and demand has been duly made upon him for said notes and the proceeds of such as had been collected, but he has declined to surrender said notes or the proceeds of such as have been collected.

9 The defendant further says that the said James Joyce and Company paid, at the time of said purchase, the sum of $10,200, in cash and afterwards paid the sum of $10,000 more in cash, and that the note sued upon herein and a note of like date, and amount, signed by Bishop Edward Fitzgerald as surety represents the balance of the deferred payments on said purchase. This defendant says that he signed said note for James E. Joyce and Company, as surety, upon the understanding and faith that the said receiver would deliver to the principal makers of said notes the property so assigned by McCarthy & Joyce Company, including the promissory notes hereinbefore described. The defendant further says that said notes were sufficient in value to more than pay the note herein sued upon, as well as the other note given for a part of the deferred payments and signed by Bishop Fitzgerald; and says that the said First national bank and said Logan H. Roots and said Armstrong, and said Sterling R. Cockrill, as receiver of the said First national bank have wrongfully and illegally refused to deliver said notes or the proceeds of such as were collected to the said James E. Joyce and Company, as they were required to do by the terms of said sale. Wherefore this defendant says that the consideration of said note has failed and he asks that the plaintiff be required to surrender up said note, and that the same may be ordered to be can-

celed by this court and for all other and proper relief in the premises.

By POWELL & MINAHAN,
Defendant's Attorneys.

STATE OF OHIO, }
Franklin County, } *ss:*

John Joyce, the above named defendant, being by me first duly sworn, upon his oath says that the facts stated and allegations contained in the above and foregoing answer are true as he verily believes.

JOHN JOYCE.

Sworn to before me and subscribed in my presence by the said John Joyce this 6th day of July, A. D. 1897.

CHAS. SNYDER,
Notary Public, Franklin County, Ohio. [SEAL.]

And afterwards, to wit, on the 18th day of October, A. D. 1897, came the plaintiff by his attorneys, and filed in the clerk's office of said court, his certain demurrer to answer in this cause, which said demurrer is clothed in the words and figures following, to wit:

Demurrer to Answer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant. } Demurrer.

10 Plaintiff herein demurs to the first and second defenses contained in the answer of the defendant herein on the ground that the said defenses do not state facts sufficient to constitute a defense.

OUTHWAITE & LINN,
Attorneys for Plaintiff.

And afterwards, to wit, on the 21st day of December, A. D. 1897, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

Entry (C, 380).

810. C. C.

This cause came on to be heard on the demurrer of pl'ff to the answer of def't, and was argued by counsel; on consideration whereof the court doth sustain said demurrer and leave is granted defendant to prepare an amendment to his answer and ask leave to file the same on or before the first day of January, 1898; to all of which counsel for defendant excepts.

And afterwards, to wit, on the 5th day of March, A. D. 1898, an entry was made upon the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

Entry (*C*, 407).

STERLING R. COCKRILL, Receiver, &c.,
vs.
JOHN JOYCE.

Upon application of defendant herein by his attorney leave is granted to file an amended answer in this cause forthwith, and the same is filed.

And afterwards, to wit, on the 5th day of March, A. D. 1898, came the defendant by his attorneys and filed, by leave of court, in the clerk's office of said court, his certain amended answer in this cause, which said amended answer is clothed in the words and figures following, to wit:

Amended Answer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff,
vs.
JOHN JOYCE, Defendant.

No. 810. Amended Answer of John Joyce.

First defense. And now comes the said John Joyce, defendant, and for his amended answer herein and by way of first defense to the plaintiff's petition says that he admits that the First National Bank of Little Rock, Ark., is a corporation organized under
11 the banking laws of the United States; that said bank became insolvent and suspended business in Feb., 1893, and that in the month of Aug., 1893, the plaintiff, Sterling R. Cockrill, was appointed receiver of said bank by the Comptroller of the Currency of the United States, and has ever since been and is still acting as such receiver. The defendant further says that he signed the notes described in the plaintiff's petition as a surety only for the firm of James E. Joyce and Company, who were the principal makers thereof and for the accommodation of said James E. Joyce and Company, without any value or consideration whatever between the parties and upon the express agreement and understanding that the conditions under which said note was to be executed, as hereinafter set forth, should be fully and faithfully complied with and performed. The defendant further says that the McCarthy-Joyce Company, a trading corporation of Little Rock, Arkansas, became involved, and, being unable to pay its debts, on or about the 16th day of January, A. D. 1893, made an assignment of all its real and

personal property to C. H. Whittemore, as assignee, under the laws of the State of Arkansas; and, after the said assignment the said the First national bank, being a preferred creditor to a very large amount of said The McCarthy-Joyce Company, accepted said assignment according to its terms, and thereupon applied to the Pulaski chancery court to have said assignee, C. H. Whittemore, appointed its receiver of all and singular the property so assigned to him, and the said court, upon said application, duly appointed said Whittemore receiver of the said property, who immediately took possession of the same and proceeded to control and administer upon the same as receiver for said bank and other creditors of the McCarthy-Joyce Company, and thereafter, by agreement of the First national bank and all other parties interested therein, the said receiver was directed by said court to sell all of said real and personal property, which he proceeded to do, and which said sale was made on the 20th day of April, 1893, to James E. Joyce and Company, who became purchasers of all of said real and personal property at and for the price of thirty-eight thousand two hundred ($38,200.00) dollars, all of which has been paid by said James E. Joyce and Company, except the note described in the plaintiff's petition, and another note of like date and amount which was signed by Bishop Edward Fitzgerald as surety for the said James E. Joyce and Company, which said two notes represent the unpaid purchase-money arising from said sale.

12 Defendant further says that at the time the order for the sale of said real and personal property was made it was expressly provided and ordered by the court that the said receiver was, in addition to obtaining endorsers or sureties upon the notes given for the deferred payments, to retain and reserve a lien upon all the real property so ordered to be sold under the statutes and laws of the State of Arkansas, by reciting in the deeds of conveyance therefor that the purchase-money for said lands had not been paid, and reserving in said deeds a lien upon said lands for all unpaid purchase-money, including the note sued on herein; and this defendant, knowing that said property was more than sufficient in value to pay all the deferred payments as provided for in said sale, and relying upon the faithful execution of said order by said receiver, became surety upon said note described in the petition herein. Defendant further says that said receiver, after having received said note, in violation of the order of the court, and in violation of the rights of this defendant, negligently and wrongfully failed to retain or reserve a lien in said deeds of conveyance upon the said real estate so sold and improperly conveyed all said real property to the said James E. Joyce and Company free and clear of any lien whatsoever. This defendant further says that said James E. Joyce and Company, after receiving said property, have sold and conveyed nearly all the real estate to third persons, who were ignorant of said order of court, made for said sale; whereby the lien which ought to have been retained and reserved has been lost; and the said defendant further says that said property was sufficient in value to have fully paid said note, as well as the other note given for the

deferred payments, and this defendant says that the said First National Bank of Little Rock, Arkansas, as well as its receiver, the plaintiff herein, received the said note with notice of all the foregoing facts, and the said note was transferred to the plaintiff herein without any consideration being paid therefor but for the sole purpose of transferring the said note to the plaintiff as the successor in interest of the said former receiver of said First National Bank of Little Rock, wherefore this defendant is discharged and released from said note, and he asks that the plaintiff be compelled to surrender said note and that the same be cancelled by order of this court.

Second defense. The defendant, for a second defense herein, says that when the McCarthy-Joyce Company made an assignment of all their real and personal estate to the said C. H. Whittemore, as assignee as set forth in the first defense herein, among the
13 property so assigned were the following sixteen promissory notes, then the property of said company, and then in the possession of the First national bank for collection. Note of Zeb Ward, Jr., dated Nov. 23, 1892, ninety days, $430.96; E. P. Ladd, dated Nov. 1, 1892, ninety days, 328.20; C. Watkins, Sept. 12, 1892, five months, 491.00; Faist & Co., Dec. 7, 1893, sixty days, 265.00; Zeb Ward, Jr., Dec. 31, 1892, thirty days, 465.00; J. C. England, Dec. 31, 1892, thirty days, 3,954.00; W. L. Reaves, Dec. 26, sixty days, 164.75; Zeb Ward, Jr., Jan. 9, 1893, thirty days, 346.06; F. Walker, 67.00; C. E. Moore, Sept. 14, 1892, six months, $800.00; Spring Hill Lumber Co., Sept. 1, 1892, 6 months, 550.00; Spring Hill Lumber Co., Sept. 1, 1892, 12 months, 550.00; Malvern Lumber Co., Sept. 4, 1892, 1 year, 1,000.00; Malvern Lumber Co., Sept. 4. 2 years, 1,000.00; C. Watkins, Aug. 18, 1892, 6 months, 400.00; C. Watkins, Aug. 16, 1892, 12 months, 475.00. The defendant further says that on the 30th day of Jan'ry, A. D. 1893, an inventory of all the property so assigned was filed in the Pulaski chancery court by said assignee in which all of the said notes were described as the property of the said McCarthy and Joyce Company and therein stated to be in the possession of the First National Bank of Little Rock, for collection. And immediately after the said assignment, the said First national bank, being a preferred creditor therein to a large amount of the McCarthy-Joyce Company accepted said assignment, according to its terms, and duly applied to the said Pulaski chancery court to have said assignee, C. H. Whittemore, appointed its receiver of said property, and he immediately thereafter took possession of the same and proceeded to control and administer it as such receiver, and thereafter, by an agreement of the parties interested in said matter, including the said First National Bank of Little Rock, and by order of said court, the said receiver was directed to sell all of said property, including the notes herein described, which he proceeded to do, and the same were fully sold to James E. Joyce and Company, who agreed to pay for the same according to the terms of said sale, the sum of $38,200.00; which sale was made on the 20th day of April, 1893, and approved by the said court; thereupon the said court directed its said receiver to deliver

to the said purchasers the stock of goods and the choses in action, including the notes herebefore described, as assigned by said The McCarthy & Joyce Company which said receiver undertook so to do. The defendant further says before said purchase the said First national bank became insolvent and Logan H. Roots was duly appointed receiver thereof by the Comptroller of the Currency of the United States and demand was made upon him for such notes
14 by the said James E. Joyce and Company and for the proceeds of such as had been collected, but said Roots declined to surrender said notes, and thereafter Roots departed this life and one Armstrong was duly appointed receiver of said bank, from whom said notes and the proceeds of such as had been collected, were again duly demanded of him by the said James E. Joyce and Company, but he declined to surrender the same; that afterwards said Armstrong resigned his said receivership and the plaintiff, Sterling R. Cockrill, was duly appointed the receiver of said bank, and demand had been duly made upon him for said notes and the proceeds of such as had been collected, but he has declined to surrender said notes or the proceeds of such as have been collected. The defendant further says that the said James E. Joyce and Company paid, at the time of said purchase the sum of $10,200.00 in cash, and afterwards paid the sum of $10,000 00 more in cash and that the note sued upon herein and a note of like date and amount signed by Bishop Edward Fitzgerald as surety represents the balance of the deferred payments on said purchase. This defendant says he signed said note for James E. Joyce and Company as surety, upon the understanding and faith that the said receiver would deliver to the principal makers of said notes the said property so assigned by McCarthy and Joyce Company, including the promissory notes hereinbefore described. The defendant further says that said notes were sufficient in value to more than pay the note herein sued upon, as well as the other note given for a part of the deferred payments and signed by Bishop Fitzgerald, and says that the First national bank and said Logan H. Roots and said Armstrong, and said Sterling R. Cockrill as receivers of the First national bank have wrongfully and illegally refused to deliver said notes or the proceeds of such as were collected to the said James E. Joyce and Company, as they were required to do by the terms of said sale. Wherefore this defendant says that the consideration of said note has failed and he asks that the plaintiff be required to surrender up said note, and that the same may be ordered to be canceled by the court and for all other and proper relief in the premises.

By POWELL & MINAHAN,
Attorneys for Defendant, John Joyce.

STATE OF OHIO, }
Franklin County, } ss:

Edson B. Dennis, being by me first duly sworn, upon his oath says that he is the agent of John Joyce, the defendant in the above-entitled action, duly authorized in the premises; that said John

Joyce is now absent from the county of Franklin and State
15 of Ohio and in southern California, and that affiant believes the facts stated and allegations contained in the above and foregoing answer are true as he verily believes.

EDSON B. DENNIS.

Sworn to before me and subscribed in my presence by the said Edson B. Dennis, this 3rd day of March, A. D. 1898.

CHAS. SNYDER,
Notary Public, Franklin County, Ohio. [SEAL.]

And afterwards, to wit, on the 5th day of March, A. D. 1898, came the plaintiff by his attorneys and filed in the clerk's office of said court, his certain demurrer to the amended answer in this cause, which said demurrer is clothed in the words and figures following, to wit:

Demurrer to Amended Answer.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Plaintiff, *vs.* JOHN JOYCE, Defendant.	Demurrer to Amended Answer.

Plaintiff herein demurs to the first and second defenses contained in the amended answer of the defendant herein on the ground that the said defenses do not state facts sufficient to constitute a defense.

OUTHWAITE & LINN,
Attorneys for Plaintiff.

And afterwards, to wit, on the 5th day of March, A. D. 1898, an entry was made upon the journal of said court, in said cause, which said entry is clothed in the words and figures following, to wit:

Entry (C, 407).

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

STERLING R. COCKRILL, Receiver, etc., Plaintiff, *vs.* JOHN JOYCE, Defendant.	No. 810.

The defendant having by leave of the court filed an amended answer herein, this cause came on to be heard on the demurrer of plaintiff thereto and was argued by counsel; on consideration whereof the court doth sustain said demurrer, and the defendant not desiring further to amend his said answer or to further or otherwise plead in this action, and this cause coming on further to be

heard on the petition, the court find there is due plaintiff from this defendant on the cause of action in the petition stated, the
16 sum of $9,484.50, principal debt, and $1,522.25 interest to the 4th day of March, A. D. 1898, in all, $11,006.75. It is therefore considered and adjudged by the court, that the plaintiff Sterling R. Cockrill as receiver of the First National Bank of Little Rock, Arkansas, recover of the defendant, John Joyce, the said sum of eleven thousand and six dollars and seventy-five cents ($11,006.75) and his costs herein expended, taxed at $—, and execution is awarded for said judgment and costs. To which judgment and finding our said demurrer the defendant excepts. And he also excepts to the judgment of the court in rendering judgment in this action.

And afterwards, to wit, on the 1st day of April, A. D. 1898, came the defendant by his attorneys and filed in the clerk's office of said court, his certain petition for writ of error, in this cause, which said petition for writ of error is clothed in the words and figures following, to wit:

Petition for Writ of Error.

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN JOYCE, Plaintiff in Error, *vs.* STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Defendant in Error.	Petition for Writ of Error.

Now comes the plaintiff in error, John Joyce, and here shows to the court that in the proceedings and judgment in a case lately pending in the circuit court of the United States, southern district of Ohio, eastern division, wherein Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, was plaintiff, and the said John Joyce was defendant, there is manifest error, as shown in the assignment of error herewith filed. Whereupon the plaintiff in error asks for the allowance of a writ of error, and that the amount of a supersedeas bond be fixed by the court in order to stay execution in said case, and that a citation issue pursuant to the statute in such case made and provided.

By THOS. E. POWELL,
Attorney for John Joyce.

And afterwards, to wit, on the 1st day of April, A. D. 1898, came the defendant by his attorneys and filed in the clerk's office of said court, his certain assignment of errors in this cause, which said assignment of errors is clothed in the words and figures following, to wit:

17 *Assignment of Errors.*

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN JOYCE, Plaintiff in Error,
vs.
STERLING R. COCKRILL, as Receiver for the First National Bank of Little Rock, Arkansas, Defendant in Error. } Assignment of Error.

Now comes the above-named plaintiff in error and here shows to the court that in the proceedings and judgment of the circuit court of the United States, southern district of Ohio, eastern division, in a cause lately pending therein, wherein Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, was plaintiff, and John Joyce was defendant, there is manifest error in this, to wit: 1. The court erred in sustaining the demurrer of the plaintiff in said case to the answer of the defendant. 2. The court erred in sustaining the demurrer of the defendant to the amended answer of the plaintiff. 3. The court erred in not overruling said demurrers. 4. The court erred in rendering a judgment in favor of the plaintiff in said case instead — the defendant. 5. Other errors apparent upon the record.

Whereupon the said plaintiff in error asks that the said judgment of the circuit court of the southern district of Ohio, eastern division, be reversed and held for naught, and that the said plaintiff in error be restored to all things he has lost by reason thereof.

By THOS. E. POWELL,
Attorneys for John Joyce.

And afterwards, to wit, on the 1st day of April, A. D. 1898, an entry was made on the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

Entry (*C*, 416).

In the Circuit Court of the United States, Southern District of Ohio, Eastern Division.

JOHN JOYCE, Plaintiff in Error,
vs.
STERLING R. COCKRILL, as Receiver for the First National Bank of Little Rock, Ark., Defendant in Error. } Journal Entry.

This day came the said John Joyce, plaintiff in error, and presented his petition for an allowance of writ of error, and an assignment of error- accompanying the same. Which petition upon consideration of the court is hereby allowed, and the court allows a

writ of error to the United States circuit court of appeals for the sixth circuit and fixes the supersedeas bond to stay execution in said case at $24,000, with sufficient surety to the approval of this court.

18 And afterwards, to wit, on the 14th day of April, A. D. 1898, there was filed in the clerk's office of said court, a certain supersedeas bond on writ of error in this case, which said supersedeas bond is clothed in the words and figures following, to wit:

Supersedeas Bond on Writ of Error.

Know all men by these presents, that we, John Joyce as principal, and John Joyce, Jr., and T. Ewing Miller, as sureties, are held and firmly bound unto Sterling R. Cockrill, receiver of the First National Bank of Little Rock, Arkansas, in the just and full sum of twenty-four thousand dollars, to be paid to the said Sterling R. Cockrill, receiver of the First National Bank of Little Rock, Ark., his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of April, in the year of our Lord, one thousand eight hundred and ninety-eight.

Whereas, lately at a circuit court of the United States for the southern district of Ohio, eastern division, in a suit depending in said court, between John Joyce and Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, a judgment was rendered against the said John Joyce, and the said John Joyce having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Sterling R. Cockrill as receiver of the First National Bank of Little Rock, Arkansas, citing and admonishing him to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the thirteenth day of May next. Now, the condition of the above obligation is such, that if the said John Joyce shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOHN JOYCE. [SEAL.]
JOHN JOYCE, JR. [SEAL.]
T. EWING MILLER. [SEAL.]

Sealed and delivered in presence of—
THOS. E. POWELL.
C. P. WHITE.

Approved by—
WM. H. TAFT,
Circuit Judge.

3—329

SOUTHERN DISTRICT OF OHIO, *ss:*

I, John Joyce, Jr., one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth forty-eight thousand dollars, in my own name, situate in the
19 county of ——, in said district.

JOHN JOYCE, JR.

Sworn to before me the 13th day of April, 1898.

C. P. WHITE,
Dep. Clerk U. S. Circuit Court, S. D. O. [SEAL.]

SOUTHERN DISTRICT OF OHIO, *ss:*

I, T. Ewing Miller, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth forty-eight thousand dollars in real estate in my own name, situate in the county of —— in said district.

T. EWING MILLER.

Sworn to before me the 13th day of April, 1898.

C. P. WHITE,
Dep. Clerk U. S. Circuit Court, S. D. O. [SEAL.]

THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Eastern Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause, as the same appears of record and on file in said court.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Columbus, Ohio, this 19th day of April, A. D. 1898.

B. R. COWEN, *Clerk,*
[SEAL.] By C. P. WHITE, *Deputy.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, }
Sixth Judicial Circuit, } *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the southern district of Ohio, eastern division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Sterling R. Cockrill as receiver of the First National Bank of Little Rock, Arkansas, and John Joyce, a manifest error hath happened, to the great damage of the said
20 John Joyce, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if the judgment be therein given, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the sixth circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the* thirteenth day of May next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-second.

[SEAL.] B. R. COWEN,
Clerk of the Circuit Court of the United States, S. D. O.,
By ROB'T C. GEORGI, *Dep.*

Allowed by—
——— ———,
———.

* Not exceeding 30 days from the day of signing the citation.

No. 810. United States circuit court, southern district of Ohio, eastern division. Filed Apr. 14", 1898. B. R. Cowen, clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, }
Sixth Judicial Circuit, }

To Sterling R. Cockrill, receiver of the First National Bank of Little Rock, Arkansas, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit,
21 on the * thirteenth day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, eastern division, wherein John Joyce is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this fourteenth day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States of America the one hundred and twenty-second.

WM. H. TAFT,
Circuit Judge.

April 14, '98.

* Not exceeding thirty days from the day of signing.

STATE OF OHIO, *County of Franklin,* } ss:

On this 18th day of April, A. D. 1898, personally appeared before me, a notary public in and for said county, James Farley, U. S. deputy marshal, and made oath that he delivered a copy of within citation to T. P. Linn, attorney, etc.

[SEAL.] JAMES FARLEY.

Sworn to and subscribed before me this 18th day of April, 1898.

ALEXANDER H. JOHNSON,
Notary Public, Franklin Co., Ohio.

UNITED STATES OF AMERICA, *Southern District of Ohio, Eastern Division,* } ss:

Received this writ on the 18th day of April, 1898, at Columbus' Ohio, and on the same day I executed the same by handing a true copy thereof with all the endorsements thereon to T. P. Linn, who is attorney for the within-named Sterling R. Cockrill, receiver for the First National Bank of Little Rock, Arkansas, who accepted service for the same.

MICHAEL DEVANNEY,
U. S. Marshal S. D. O.,
Per JAMES FARLEY, *Deputy.*

22 *Fees.*

1 copy	50
1 mi. of writ	06
1 service	2 00
	2 56

No. 810. Marshal's civil docket No. 576. United States circuit court, southern district of Ohio, eastern division. Sterling R. Cockrill, as receiver, &c., *vs.* John Joyce. Citation. Filed Apr. 19, 1898. B. R. Cowen, clerk.

23 And afterwards, to wit, on April 26th, 1898, the appearance of Thomas E. Powell, counsel for the plaintiff in error, was filed, which reads and is in the words and figures as follow:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1897.

JOHN JOYCE
v.
STERLING A. COCKRILL, Receiver First National Bank of Little Rock. } No. 613.

To the clerk of said court:

Please enter my appearance as counsel for the plaintiff in error.

THOMAS E. POWELL,
Counsel for Plaintiff in Error.

And afterwards, to wit, on September 15th, 1898, a stipulation was filed, which is in the words and figures following:

Stipulation.

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN JOYCE, Plaintiff in Error,
v.
STERLING COCKRILL, Receiver of First National Bank of Little Rock.

24 We hereby consent to the filing of brief for defendant in error.

POWELL & MINIHAN,
Counsel for Plaintiff in Error.

And afterwards, to wit, on December 20th, 1898, an entry was made upon the journal of said court in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN JOYCE
v.
STERLING A. COCKRILL, Receiver, etc.

Error from the Circuit Court of the United States for the Southern District of Ohio. Before Judges Taft, Lurton, and Severens.

This cause coming on for hearing is argued on behalf of plaintiff in error by Mr. Thomas E. Powell, and the further hearing of the cause is continued until tomorrow.

And afterwards, to wit, on December 21st, 1898, an entry was made upon the journal of said court in said cause which is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN JOYCE
v.
STERLING A. COCKRILL, Receiver, etc.

25 This cause is further argued by Mr. Thomas E. Powell for plaintiff in error, and by Mr. T. P. Linn for defendant in error, and is submitted.

And afterwards, to wit, on March 7th, 1899, a judgment was rendered in said cause which reads and is as follows:

Judgment.

United States Circuit Court of Appeals for the Sixth Circuit.

JOHN JOYCE *v.* STERLING A. COCKRILL, Receiver First National Bank of Little Rock.	# 613. Error to the Circuit Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

And afterwards, to wit, on March 18th, 1899, a printed opinion was filed in said cause which reads and is as follows:

Opinion.

26 United States Circuit Court of Appeals, Sixth Circuit.

JOHN JOYCE *v.* STERLING R. COCKRILL, Receiver First National Bank of Little Rock.	No. 613. Error to the Circuit Court of the United States for the Southern District of Ohio.

Submitted December 21, 1898; decided March 7, 1899.

Before Taft and Lurton, circuit judges, and Severens, district judge.

Opinion by LURTON, *Circuit Judge:*

This is an action upon a promissory note made by James E. Joyce & Co., and the plaintiff in error, John Joyce as surety. The note is one of several made for the purchase price of the assets of an insolvent trading corporation, sold under order and directions of a chancery court at Little Rock, Ark. All the notes were payable to a receiver appointed by said court, and the note in suit was assigned to the First National Bank of Little Rock, which sues through the defendant in error, its duly appointed receiver. The suit was by petition according to the Ohio Code practice, and was against John Joyce only. Joyce by answer presented two defenses. There was a general demurrer going to both defenses, which the court sustained. The defendant below refused to further plead, whereupon the court rendered judgment for the amount of the note, interest and costs. The action of the court in sustaining the demurrer to the answer has been assigned as error. The property sold by the receiver consisted of a stock of goods and merchandise, real estate and choses in action. It was sold in bulk for the gross price of $38,200.00. The note in suit is for $9,000, is dated March

20, 1893, and is payable three years after date. The decree of sale directed the receiver to require personal security upon the
27 deferred payments and to reserve a lien in his deed of conveyance of the real estate included in the sale.

The first defense of the answer is, that the said John Joyce became the surety of James E. Joyce & Co. upon the agreement and understanding that the lien directed by the court would be reserved. It is then averred that the receiver negligently and in violation of said order of the court conveyed said real estate without reserving any lien in his deed, and that said James E. Joyce & Co. have since sold and conveyed said property to third persons, who were ignorant of said order of court made for said sale "whereby the lien which ought to have been retained and reserved has been lost." It is further averred that the value of the real estate so sold was sufficient to pay the unpaid purchase-money consisting, as alleged, of the note in suit and of another of like amount outstanding, upon which one Fitzgerald is sole security. These facts are plead in discharge and relief of plaintiff in error as surety upon the note in suit. While it is stated in the answer that the agreement and understanding between the plaintiff in error and the principal debtors was that the receiver should retain or reserve a lien, as provided by the statute law of Arkansas, in his deed conveying to said James E. Joyce & Co. the real estate, which was part of the consideration for which this note was executed, and that the Little Rock bank, to whom the note was subsequently assigned, took the note with knowledge of the facts stated in the petition, yet it is not averred that the receiver, who was to reserve the lien, was informed when he accepted the note or before he conveyed the land, that any such conditions were attached by the surety to his liability. It is not stated whether the note was delivered to the receiver by the surety or by the purchasers of the property. But whether by the one or the other, plaintiff in error chose to remain silent as to any conditions or intrusted the note for delivery to the purchasers and is equally bound by the silence of the latter. A surety is not discharged even against the payee by evidence that the obligation upon which he is sued was delivered to the principal obligor upon conditions which have not been performed, if the payee accepted the instrument without notice and would sustain loss if deprived of the security upon which he relied. This principle has been applied to official bonds as well as to promissory notes and other negotiable paper. Thus in Dair *v.* United States, 16 Wall., 1, a distiller's bond, perfect upon its face, was signed by a surety and delivered to one of the principal obligees upon condition that it should not be delivered unless it was executed by other persons who did not execute it. The obligee had no notice of this condition and accepted it. It was held these facts constituted no defense by the surety, who had thus signed the bond upon a
28 condition which had not been performed. To the same effect are the cases of Amis *v.* Marks, 3 Lea, 568, and Buford *v.* Cox, 3 Lea, 518, State *v.* Potter, 63 Mo., 212, State *v.* Peck, 53 Me., 284. Neither will a surety upon a promissory note, or a private bond, in the hands of the payee, be discharged upon evidence that

he had signed the note or bond upon conditions not performed, but of which the payee had no notice.

Jordon *v.* Jordon, 10 Lea, 124; Russell *v.* Freer, 56 N. Y., 67; McCormick *v.* Bay City, 23 Mich., 457: Davis *v.* Gray, 61 Texas, 506; Merriam *v.* Rockwood, 47 N. H., 81.

But it is insisted that by the neglect of the receiver a lien has not been reserved which would, through subrogation, have enured to the benefit of the surety. Undoubtedly the general principle is, that if a creditor do any act inconsistent with the rights of the surety and injurious to him, or omits to do any act which his duty to the surety obliges him to do, and thereby injures the surety, the latter will be discharged to the extent of such injury. Story's Eq. Juris., sec. 693–325. So a surety is entitled to the benefit of all securities which the creditor obtains from the principal debtor, and if the creditor by any affirmative act surrender them to the debtor, or they are lost through the neglect of some duty owing to the surety, the latter will be exonerated, to the extent of the loss thus sustained. Evans *v.* Kister *et al.*, decided at this term. The facts of this case do not bring it within the principles relied upon. The receiver surrendered no lien. He never had a lien. He might have acquired one by an express reservation in his deed to the purchasers, but in no other way. The case would be very different if he had released such a lien after it had arisen. But the complaint is that he might have acquired a lien and chose not to do so, and to rely alone upon the purchaser and his surety. It may be admitted that he failed in his duty by not reserving a lien as directed by the decree. But to whom was this duty due? To the court and to the parties interested in the proceeds of sale. It was a duty imposed upon him by the court for the protection of the owners of the property and the creditors interested in its sale. Admit that he failed in the discharge of this official duty. Can this surety obtain any benefit therefrom? If so, it will be at the expense of the creditors who, having lost one security through the negligence of the receiver, will be deprived of the benefit of another which he did take. Yet the negligence of the creditors thus to be punished does not equal that of the surety who seeks to make it available for his own release. If those interested in the proceeds of the sale should have seen to it that the receiver did not neglect to take this lien, quite as much may be said as to the surety. He either delivered the note himself, or suffered his principals to deliver it to the receiver, without notice that his liability was to depend upon
29 the reservation of this lien. It is incredible that the receiver would have accepted the note subject to such conditions, or, if he did, that he would have conveyed the property without reserving a lien. Upon the averments of the answer the assignee of this note stood upon no higher footing than the receiver would if he in his official character were plaintiff. Still the negligence of the surety in failing to give notice to the receiver of the conditions upon which he was to become liable, and in failing to see that the receiver's deed reserved the lien directed by the court, is greater than

that of the owners of the property or the creditors interested in the proceeds of sale.

But this loss or injury has come about through the neglect of a public official to execute properly a duty imposed by the decree under which he was acting. That duty was imposed not for the benefit of the sureties who might strengthen the notes of the purchaser, but for the benefit of the parties to the cause. He was, therefore, under no active or affirmative duty to the surety. He had no notice of the conditions upon which the surety had signed nor of his reliance upon the lien of a vendor for his protection. The performance of this official duty might have prevented loss to this surety. But mere laches or negligence, or non-performance of some act which might have benefited a surety, will not, in the absence of some express covenant or condition, discharge a surety. The neglect must be of some duty owing to the surety. In the case of The Board of Supervisors *v.* Otis *et al.*, 62 N. Y., 88–92, the sureties upon the official bond of a county treasurer sought to be discharged from liability upon their obligation because of the neglect of other county officials whose duty it was to make stated examinations of the accounts of the treasurer. The court held that this duty was one owing to the public and not to the sureties. In that case the court stated the rule as between sureties and obligees in a way which meets our approval. "Mere passive negligence," said the court, "or laches of an obligee or creditor, mere non-performance of some affirmative act which if performed might prevent loss to the surety, will not, in the absence of some express covenant or condition to that effect, discharge a surety, and that the neglect of duty which is available as a defense for a surety must be of some duty owing to the surety, and not to others; some positive duty undertaken in behalf of and for the benefit of the surety." To the same effect is the case of Warnell *v.* Williams, adm'r, 19 Texas, 180, where the sureties upon the note of a purchaser at an administrator's sale sought to be released from liability upon the ground that the Texas statute and the order of the court required that a mortgage should be taken at such sales upon property sold, and that they would not have become sureties except in reliance upon this statute and order, and that the neglect of the administrator to take the security required by statute and order of the court should operate to relieve them. The Texas court held that upon these facts the sureties were not released. In Dye *v.* Dye, 21 Ohio State, 93, the general principle is thus stated:

"'A creditor may, however, in many ways do that which, though it may not affect the liability of the principal, will exonerate sureties. In all such cases the discharge of the surety is based on some recognized and well-defined principle, and, in general, results from a positive act of the creditor which operates to the perjudice of the surety. Passiveness on the part of the creditor will not discharge the surety, unless he omits to do, when required by the surety, what the law or his duty enjoins him to do, or unless he neglects, to the injury of the surety, to discharge his duty in any matter in which he occupies the position of a trustee for the surety. The discharge

of the surety is not claimed in this case by reason of any positive act of the creditor, not by reason of his neglect to prosecute the claim, after being required by the surety to do so by notice in writing, in accordance with the statute; nor, indeed, by reason of his neglect to comply with any requirement of the surety whatever, for, from aught that appears, the passiveness of the surety equaled that of the creditor. Nor did the creditor have anything in his hands, actually or constructively, in the nature of a trust. Then, upon the principles already so broadly stated, it would seem that the surety was not exonerated from liability on the note.'"

To the same general effect are the cases of Schroeppell *v.* Shaw, 3 N. Y., 446; Humphrey *v.* Hitt, 6 Gratton, 509; Sawyer *v.* Bradford, 6 Ala., 68; Mendhorf *v.* Singer, 124 Mass., 77.

The learned counsel for plaintiff in error have cited and relied upon a number of cases, including the cases of Burr *v.* Boyer, 2 Neb., 265; and Wolf and Billing *v.* Jay, 7 Queen's Bench, 761. Most of them are distinguishable from the case in hand, but in so far as they are in conflict with the cases cited and relied upon, it is enough to say that they do not meet with our approval and are not in accord with the great weight of authority. The cases of Burr *v.* Boyer, *supra*, and Wolf and Billing *v.* Jay, *supra*, were cases in which an actual existing security was lost by the neglect of the creditor to register the instrument. Without stopping to consider these cases, it is enough to say that they are distinguishable from the one at bar by the fact, that no existing lien has been sacrificed and that the only fault of the creditor here complained of, is, that he did not reserve a lien when he might and should have done so in obedience to the order of the court.

There remains the defense of failure of consideration. This defense rests upon the averment that among the assets of the McCarthy, Joyce Company, sold to James E. Joyce & Co., were certain promissory notes then in possession of the defendant in
31 error as receiver for the First National Bank of Little Rock, and that said receiver, though often requested, has refused to surrender same to said James E. Joyce & Co. The consideration which is sufficient to support the principal's contract is the consideration upon which that of the surety rests. It follows, therefore, that if the consideration upon which this note was executed by the principal makers was sufficient, that there is no failure of consideration which can be available to the surety, unless his own engagement was entered upon under some other and independent agreement. This the answer attempts to show by the statement that the defendant became surety "only upon the understanding and faith" that all of the assets of the McCarthy, Joyce Company, sold to his principals, James E. Joyce & Co., including the notes then in the possession of the bank or its receiver, would be delivered to said purchasers, and the failure to obtain said notes is relied upon as constituting a failure of consideration. This, if true, would constitute only a conditional obligation, and failure to comply with the condition would discharge the surety without regard to its effect upon the obligation of his principals. It is manifest, however,

that the averments of the answer are insufficient to discharge the surety, for it is not averred that either the court or its receiver, the payee of the note, accepted the note and delivered the assets for which it was in part executed with notice of any condition. The authorities for this conclusion have been already cited in disposing of the first defense.

Undoubtedly a surety may, when the contract has not been assigned to a purchaser for value without notice, when called upon to perform, show either a total or partial failure of the consideration of his principal's contract. But such a defense when made by the surety must be one which would be available to the principal if sued. Here again the averments of the answer are insufficient. This note in suit was not executed for any specific part of the property purchased by James E. Joyce & Co., but was made in part consideration for a lumping sale of the entire assets of the McCarthy, Joyce Company, consisting of lands, a stock of merchandise and a mass of choses in action. The averment is that among these choses in action were certain promissory notes aggregating about $11,000.00, payable to that company, which had been placed by the payee in possession of the Little Rock bank for collection, and which were so in possession of that bank, or its receiver, both when that company made its general assignment and when its assets were sold to James E. Joyce & Co. The ground upon which the bank's receiver, the defendant in error, refused to surrender these notes is not stated, though, as it is stated that the bank was a large creditor of the said McCarthy, Joyce Company, it is most probable that it asserted a banker's lien thereon to secure its general
32 account as a creditor. But if we assume, as probably we should in view of the averments of the answer, that the defendant in error would be estopped to assert such a lien, the bank having been a party to the suit in which it is averred a decree was rendered directing the sale, we are driven to the inevitable conclusion that James E. Joyce & Co. obtained the superior title to said notes subject to no incumbrance in the nature of a banker's lien. The purchasers obtained, upon this hypothesis, just what the surety asserts they bought. That the purchaser knew that the notes in question were not actually in the custody of the court or its receiver when this sale occurred sufficiently appears, for the claim to these notes is rested upon the averment that the receiver had scheduled them as assets "in possession of the bank for collection." So it is stated that after the sale had been reported and confirmed and the terms of sale complied with by the purchasers, an order was made directing the court's receiver to deliver to the purchasers the property so sold, including said notes so at the time in possession of the defendant in error. It further appears that all of the property so sold was delivered to said purchasers and proper conveyance made, except these notes. It is then stated that the said purchasers had made repeated demands upon the said bank and its receiver, the defendant in error, for said notes or their proceeds, but that such demand had been refused, and that the defendant in error continues to withhold said notes or their proceeds. No objection was taken

in the court in which the sale was made by reason of this refusal of one of the parties to the cause to deliver these notes to the purchaser. No effort was then made to rescind the contract or to obtain any abatement of price or to obtain an order of that court upon the defendant in error for these notes. Upon the contrary, the case as made by the answer establishes that the purchaser bought, along with the other assets, certain notes at the time in possession of the defendant in error, and by the decree obtained the title and right to same or their proceeds. They have not yet secured same, though on the facts stated, no good reason is shown why they may not assert their title through appropriate legal proceedings. Upon this view of the case there can be no pretense that the consideration of the principal's contract has failed in whole or part. Subsequently the note in suit seems to have been assigned to the bank's receiver by Wittemore, the court's receiver. Inferably, this was done in course of the distribution of the assets among the creditors. It is averred that the defendant in error took the note with knowledge of the facts stated in the defendant's answer. We have, therefore, assumed that the note is subject to all defenses which could be made against the original payee.

As the defense of failure of consideration would not be
33 available to the principals in the note in a suit against them by the payee, it is a defense not available to their surety. It may be that upon the facts stated in this answer there exists against the defendant in error a liability to account to the principals of the plaintiff in error for the notes in question or their proceeds. But such liability constitutes an independent right of action to recover the notes themselves, or for damages for their detention or conversion. But that is a right of action which belongs to the principals and cannot be claimed or asserted by their surety. It is certainly not a right of set-off belonging to the surety, for only mutual claims are the subject of set-off. That it might be asserted as a counter-claim by the principals, if sued, may be conceded. Even then they would be under no obligation to set it up by way of recoupment or counter-claim, for if the facts do not constitute a failure of consideration, they might reserve their claim and bring a separate action. Under sec. 5072 of the Ohio Civil Code, the counter-claim which a defendant may set forth in his answer "must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition." Manifestly this is not a right of action in favor of the surety upon which "a several judgment might be had." But upon general principles this liability of the defendant in error to account for the notes in question cannot be relied upon as either a set-off or counter-claim. First, because if it be set up and allowed here, it must bar any future action by the principal makers of the note. Second, the answer shows another note of like amount outstanding upon which a different person is liable as surety. One surety has no more right to appropriate this counter-claim for his own benefit than the other. If each should be sued and make the same defense, how would their

conflicting claims to control and appropriate this counter-claim be reconciled? In Gillespie *v.* Torrance, 25 N. Y., 306, the suit was, as here, against the surety upon a note and the defense was a failure of consideration. The note was given for the price of timber sold to the principal maker of the note. The timber was in a raft and the quantity and quality was estimated upon certificates of a surveyor. The defense was that there was a gross mistake as to quantity and a breach of warranty in that respect as well as in quality. The court held that the defense of failure of consideration was not made out and that the surety could not avail himself of the breach of warranty as to quantity or quality. The court said that though there seemed "a strong equity in favor of the defendant to have the note canceled or reduced, by applying towards its satisfaction the damages which appear to be due to Van Pelt for the breach
34 of warranty," that it was an equity in which Van Pelt was interested to even a greater extent than the defendant, and could not be disposed of without having him before the court. In Lasher *v.* Williamson, 55 N. Y., 619, the action was against the sureties of a lessee who sought to defend by showing that the plaintiff, as part of the contract between himself and their principal lessee, had agreed "to furnish to him during the period of the lease a certain quantity of property to be stored upon the leased premises at an agreed price," and that he breached this agreement. The court said:

"'The breach of that promise gave (the lessee) a cause of action against the plaintiff, but this cause of action in favor of Gibbs (the lessee and principal maker of the bond), cannot be available to the sureties. It belongs to Gibbs and not to them.' * * * 'The non-performance or partial performance of Lasher's engagement to Gibbs is not to be regarded as a failure of consideration, but as an independent cause of action, which Gibbs, and he only, may assert. It is in his election to determine whether it shall be used defensively or whether he will bring his own action for the damages, or whether he will forego his claim altogether. The defendants have no control over him in this respect and cannot borrow and avail themselves of his rights.'"

It is proper to observe that neither set-off nor counter-claim were set forth as distinct defenses in the answer. Without admitting that either defense could be made under the defense of failure of consideration, we have preferred to treat the defenses as if properly pleaded.

There was no error in sustaining the demurrer to the answer and the judgment will be affirmed.

35 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of John Joyce *vs.* Sterling R. Cockrill, receiver of the First National Bank of Little Rock, No. 613, October term, 1898, as the same remains upon the

files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this 29th day of May, 1899.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

36 In the Supreme Court of the United States.

JOHN JOYCE, Plaintiff in Error,
vs.
STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Defendant in Error.

At law.

Petition for Writ of Error.

And now comes John Joyce, plaintiff in error herein, and says that on or about the 7th day of March, A. D. 1899, the United States circuit court of appeals for the sixth circuit entered judgment against him in favor of the defendant in error, Sterling R. Cockrill, receiver of the First National Bank of Little Rock, Arkansas, for the sum of $9,484.50, and the interest thereon, making the judgment in all more than eleven thousand dollars, in a case then pending in said United States circuit court of appeals for the sixth circuit, wherein said John Joyce was plaintiff in error and the said Sterling
37 R. Cokrill, as receiver of the First National Bank of Little Rock, Arkansas, was defendant in error, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of this plaintiff in error, and there is manifest error in said judgment and proceedings, as shown in the assignment of errors herewith filed with this petition in error.

The said plaintiff in error further says that the jurisdiction in said court did not depend entirely upon the opposite parties to the said suit or controversy being aliens and citizens of the United States or citizens of different States, nor did said cause arise under the patent laws, nor under the revenue laws, nor under the criminal laws, and the said cause was not an admiralty cause, nor was said cause one in which the said circuit court of appeals had final jurisdiction, but said cause was one in which there is given the right of a writ of error for the review of said cause by the Supreme Court of the United States, according to the provisions of section 6 of the act entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes."

38 Wherefore the plaintiff in error asks for the allowance of a writ of error herein to the United States circuit court of

appeals for the sixth circuit for the correction of the errors so complained of, and that a transcript of the records, proceedings, and papers in said cause, duly authenticated, may be certified and sent to this court, and that the said judgment in said cause against him be reversed, annulled, and altogether held for naught, and that he may be restored to all things he has lost by occasion of said judgment.

THOMAS E. POWELL AND
THOMAS B. MINAHAN,
Attorneys for Plaintiff in Error.

Allowed this April 29th, 1899. If superseded, bond in penalty of $24,000. If only bond for costs, penalty of $500.

JOHN M. HARLAN.

39 [Endorsed:] In the Supreme Court of the United States. John Joyce, plaintiff in error, *vs.* Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas. At law. Petition for writ of error.

40 In the Supreme Court of the United States.

JOHN JOYCE, Plaintiff in Error,
vs.
STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Defendant in Error.

At law.

Assignment of Errors.

And now comes the above-named plaintiff in error and here shows to the court that in the proceedings and judgment of the United States circuit court of appeal- for the sixth circuit, in a cause lately pending therein wherein John Joyce was plaintiff in error and Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, was defendant in error, there is manifest error, in this, to wit:

1. The said court erred in affirming the judgment of the circuit court below.

2. The court erred in finding there was no error in the judgment or proceedings of the circuit court.

3. The court erred in sustaining the demurrer of the
41 plaintiff below to the original and amended answers of the defendant below.

4. The court erred in not overruling said demurrers.

5. The court erred in rendering judgment in favor of the defendant in error in said cause instead of the plaintiff in error.

6. Other errors apparent upon the record.

Wherefore the said plaintiff in error asks that the said judgment of the United States circuit court of appeals for the sixth district

be reversed and held for naught, and that the said plaintiff in erro be restored to all things he has lost be reason thereof.

THOMAS E. POWELL AND
THOMAS B. MINAHAN,
Attorneys for Plaintiff in Error.

42 [Endorsed:] In the Supreme Court of the United State John Joyce, plaintiff in error, *vs.* Sterling R. Cockrill, as r ceiver of the First National Bank of Little Rock, Arkansas. A law. Assignment of error-.

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges the United States circuit court of appeals for the sixth circui Greeting:

Because in the record and proceedings, as also in the rendition the judgment of a plea which is in the said United States circu court of appeals, before you or some of you, between John Joyc plaintiff in error, and Sterling R. Cockrill, as receiver of the Fir National Bank of Little Rock, Arkansas, defendant in error, a man fest error hath happened, to the great damage of the said plaintiff i error, as by his complaint appears, we, being willing that error, any hath been, should be duly corrected and full and speed justice done to the parties aforesaid in this behalf, do command yo if judgment be therein given, that then, under your seal, di tinctly and openly, you send the record and proceedings afor said, with all things concerning the same, to the Supreme Court the United States, together with this writ, so that you have th same in the said Supreme Court, at Washington, within 30 day from the date hereof, that, the record and proceedings aforesai being inspected, the said Supreme Court may cause further to b done therein to correct that error what of right and according t the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W Fuller, Chief Justice of the Unite States, the 8th day of May, in the yea of our Lord one thousand eight hu dred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

May 8th, 1899.

44 UNITED STATES OF AMERICA, *ss:*

To H. F. Auten, successor of Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein John Joyce is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 8th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

45 COLUMBUS, OHIO, *May* 16, '99.

Service of the within citation in error is hereby acknowledged, and the appearance of H. F. Auten, as successor to Sterling J. Cockrill, defendant in error, is hereby entered.

JOSEPH H. OUTHWAITE,
TALFOURD P. LINN,
Att'ys for Def't in Error.

46 Know all men by these presents that I, John Joyce, as principal, and John Joyce, Jr., as surety, are held and firmly bound unto H. F. Auten, successor of Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, in the full and just sum of twenty-four thousand ($24,000.00) dollars, to be paid to said H. F. Auten, successor to Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, or to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a session of the United States circuit court of appeals for the sixth circuit, in a suit depending in said court between John Joyce, as plaintiff, and Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, as defendant, a judgment was rendered against the said John Joyce on or about the 5th day of March, A. D. 1898, in said cause, in the sum of eleven thousand six and seventy-five hundredths ($11,006.75) dollars, together with interest thereon, at the rate of 6 *% per cent.* per annum, from the 5th day of March, A. D. 1898, and the said John Joyce having obtained leave and filed a copy thereof in the clerk's

office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said H. F. Auten, successor to Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof:

Now, the condition of the above obligation is such that if the said John Joyce, his executors, administrators, or assigns, shall
47 prosecute said action to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN JOYCE. [SEAL.]
JOHN JOYCE, JR. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in the presence of—

THOS. B. MINAHAN.
JOSEPH F. BURKLEY.

Approved by—

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

May 8th, 1899.

COLUMBUS, O., *May* 2, '99.

We hereby certify that John Joyce and John Joyce, Jr., whose names are signed to the above bond, are in our judgment sufficient, provided they are satisfactory to the court.

OUTHWAITE & LINN,
Att'ys for Cockrill, Receiver, and H. F. Auten, Successor.

I believe this security to be good.

WM. H. TAFT,
Circuit Judge.

Endorsed: In the Supreme Court of the United States. John Joyce, plaintiff in error, *vs.* Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, defendant in error. Bond.

48 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of an appeal bond filed June 13, 1899, in the case of John Joyce *et al. vs.* Sterling B. Cockrill, rec., etc., No. 613, October term, 1898, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals. Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this 13th day of June, 1899.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

49 In the Supreme Court of the United States.

JOHN JOYCE, Plaintiff in Error,
vs.
STERLING R. COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, Defendant in Error. } No. —. Stipulation.

It is hereby stipulated between the parties above named that since the commencement of the above action in the United States circuit court of appeals for the sixth circuit Sterling R. Cockrill has ceased to be receiver for the First National Bank of Little Rock, Arkansas, and his powers as such receiver have ceased, and that H. F. Auten has been appointed as the successor of the said Sterling R. Cockrill as receiver of said The First National Bank of Little Rock, Arkansas, and is now the duly qualified and acting receiver of said bank.

It is therefore agreed between the said parties that the said H. F. Auten, as receiver of the First National Bank of Little Rock, Arkansas, be substituted in the place of Sterling R. Cockrill as defendant herein, and the clerk of the Supreme Court of the United
50 States is hereby authorized and empower- to make such substitution.

Approved this 1st day of May, A. D. 1899.

POWELL & MINAHAN,
Attorneys for Plaintiff in Error.
OUTHWAITE & LINN,
Attorneys for Defendant in Error.

51 [Endorsed:] In the Supreme Court of the United States. John Joyce, pl'ff in error, *vs.* Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas, def't in error. Stipulation.

Endorsed on cover: File No., 17,443. U. S. C. C. of appeals, 6th circuit. Term No., 329. John Joyce, plaintiff in error, *vs.* H. F. Auten, successor of Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Arkansas. Filed June 22nd, 1899.